The court of appeals then held that the 2004 Master Manual complied with that requirement. Pet. App. 16. The court recognized that, under the 2004 Master Manual, navigation support would be reduced or eliminated if the amount of water stored in the reservoir system fell below the amount necessary to "meet authorized purposes during significant multi-year drought periods." *Ibid.* The court noted, however, that, according to the Corps' estimates, that provision of the Master Manual would lead to the elimination of the entire navigation season in only four out of every 100 years, and the shortening of the navigation season in another eight. *Ibid.* "Under these circumstances," the court concluded, "we cannot say that the Corps failed to consider downstream navigation before making its decision." *Ibid.*

In a footnote, the court of appeals reiterated that the Flood Control Act treated flood control and navigation as dominant functions. Pet. App. 16 n.7. The court then stated that, "[i]f, due to extreme conditions, the Corps is faced in the future with the unhappy choice of abandoning flood control or navigation on the one hand or recreation, fish and wildlife on the other, the priorities established by the [Act] would forbid the abandonment of flood control or navigation." *Ibid.* "[W]e do not rule out the possibility," the court added, "that some more limited degree of support for flood control or navigation in the future could be held to constitute 'abandonment' of these dominant functions." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 13-24) that the Flood Control Act of 1944 does not require the Army Corps of Engineers to give priority to navigation over other functions in managing the waters of the Missouri River Ba-

sin. The court of appeals, however, held only that the 2004 Master Manual, which balances navigation with other interests, did not violate the Flood Control Act. To the extent that language in the court of appeals' opinion suggests that the "abandonment" of navigation would violate the Flood Control Act, that language is essentially dictum addressing a situation that may never occur. Further review is therefore unwarranted.

1. Petitioners assert (Pet. 15) that the court of appeals held that the Act requires the Corps to give priority to navigation over other functions. That assertion is erroneous. Although the court of appeals did note that navigation was a "dominant function" of the Act, Pet. App. 15 (citing *ETSI Pipeline*, 484 U.S. at 512),[4] it did not hold that the Corps was required to give priority to navigation at the expense of other functions in the ordinary operation of the Main Stem System; instead, it stated only that Corps was required to "consider[]" each of the statutory functions, and strike a balance among those functions, in its management decisions, *ibid.* Because the Corps had considered all of the statutory functions, including navigation, in devising the 2004 Master Manual, the court ultimately held that the 2004 Master Manual did not violate the Act—even though it contemplated the possibility of reducing water flows to an ex-

[4] As petitioners note (Pet. 17-19), in *ETSI Pipeline*, the Court stated that one of the plans proposed before passage of the Flood Control Act "recognized that the 'dominant function' of Lake Oahe and the other main-stem reservoir projects would be flood control and navigation." 484 U.S. at 512. The Court's description of the "dominant function" of the reservoirs was relevant in determining whether operation of the Main Stem System would come within the jurisdiction of the Corps or the Department of the Interior. See *ibid.* The Court, however, did not address any issue pertaining to the Corps' own balancing of competing uses of water.

tent that would restrict or eliminate navigation under certain conditions. *Id.* at 16.

To be sure, in a footnote, the court of appeals suggested that the Corps would be forbidden from abandoning navigation *altogether* (and left open the question whether support for navigation that fell short of what was provided for in the Master Manual could constitute abandonment of navigation). Pet. App. 16 n.7. Like the language in the text of the opinion stating that navigation was a "dominant function" of the Act, however, that language was not essential to the holding of the case. It is a long-established principle that this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); accord *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945); *J.E. Riley Inv. Co.* v. *Commissioner*, 311 U.S. 55, 59 (1940); *Williams* v. *Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827); *M'Clung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821). Moreover, to the extent that the court of appeals suggested that the Corps would be forbidden from abandoning navigation altogether, petitioners do not suggest that the Corps intends, or is likely, to abandon navigation altogether in the future. Because any harm to petitioners from the court of appeals' decision is thus entirely speculative, and because petitioners obtained the *holding* that they sought from the court of appeals (*i.e.*, a holding that the 2004 Master Manual did not violate the Flood Control Act), further review is not warranted at this time.

2. Petitioners correctly note (Pet. 11) that, in the brief in opposition to petitioners' petition for a writ of certiorari from the court of appeals' earlier decision in *Ubbelohde*, the federal respondents argued that this

Court should deny review on the ground, *inter alia*, that the court of appeals' decision was interlocutory. See Br. in Opp. at 16, *North Dakota* v. *Ubbelohde*, cert. denied, 541 U.S. 987 (2004) (No. 03-935). Unlike the decision below, however, the court of appeals' earlier decision in *Ubbelohde* involved a holding that was actually adverse to petitioners: *viz.*, that they were not entitled to preliminary injunctions on their underlying claims that the Corps' actions violated the Flood Control Act and the then-applicable 1979 version of the Master Manual. See 330 F.3d at 1027-1032. Those claims were effectively superseded when the Corps promulgated the 2004 version of the Master Manual, which, unlike the 1979 version, did not expressly provide that navigation had priority over recreation. See *id.* at 1020. And in the brief in opposition in *Ubbelohde*, the federal respondents also argued that the Court should deny review because the court of appeals reasoned that the Flood Control Act required the Corps only to *consider* all of the enumerated statutory functions, not to give *priority* to navigation over other functions in the ordinary operation of the Main Stem System. See Br. in Opp. at 15, *Ubbelohde*, *supra*. If further review was unwarranted in *Ubbelohde*, therefore, it is *a fortiori* unwarranted here, where the reasoning below was similar but where the holding below was affirmatively in petitioners' favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF NORTH DAKOTA
and STATE OF SOUTH DAKOTA,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICI CURIAE MANDAN, HIDATSA, AND ARIKARA NATION AND THE CHEYENNE RIVER SIOUX INDIAN TRIBE IN SUPPORT OF PETITION FOR CERTIORIARI

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INTEREST OF AMICI CURIAE

I. The destruction of Amici Curiae reservations in the 1950's.

The Mandan, Hidatsa, and Arikara Nation and the Cheyenne River Sioux Tribe (collectively referred to hereinafter as "the Tribes") had in excess of 259,000 acres of their best bottomlands along the Missouri River flooded by the United States under the Flood Control Act of 1944. As a long-time, widely-respected observer of U.S.-tribal relations stated: "The Pick-Sloan Plan was, without doubt, the single most destructive act ever perpetrated on any tribe by the United States." Vine Deloria, Jr., *Foreward*, Michael L. Lawson, *The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980* at xiv (1982). These lands, containing homes, community buildings, and farms, had been protected by the United States under the 1851 Treaty of Fort Laramie, 11 Stat. 749 (Mandan, Hidatsa, and Arikara Nation), and the 1868 Treaty of Fort Laramie, 15 Stat. 635 (Cheyenne River Sioux Tribe), but were nonetheless destroyed to create the enormous Lakes Sakakawea and Oahe. Pub. L. 83-776, 68 Stat. 1191 (1954) (Cheyenne River); Pub. L. 81-437, 63 Stat. 1028 (1953) (Mandan, Hidatsa and Arikara Nation).

The role of the bottomlands and the harm caused by removing Indian people from these lands on the Missouri River has been studied and told. It appears in broad studies such as Michael L. Lawson, *The Pick-Sloan Plan and the Missouri River Sioux, 1944-1980* (1982), and Roy V. Meyer, *Fort Berthold and the Garrison Dam*, 35 N.D. History 216 (1968), and in more closely focused studies, such as Christyann Ranck Maxfield, *Goodbye to Elbowoods: The Story of Harold and Eva Chase* (1986), and Paul VanDevelder, *Coyote Warrior: One Man, Three Tribes,*

and the Trial that Forged a Nation (2004). It has been recognized by Congress in the legislative history and the enactment of such Acts as the Cheyenne River Sioux Tribe Equitable Compensation Act, Pub. L. 106-511, § 102, 114 Stat. 2365 (2000). Much of what follows is from these sources.

The loss of Missouri River bottomlands and removal of Indian citizens to the wind-swept plains above the river, was traumatic.[1] The relocation "caused chaos and heartache." *Id.* at 51. It touched every aspect of tribal life.[2]

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[1] The dam "destroyed more Indian land than any other public works project in America." Lawson, *supra*, at 50. The Mandan, Hidatsa and Arikara Nation lost in exess of 155,000 acres and the Cheyenne River lost 104,420 acres. The inundation destroyed choice grazing land of 75% of the ranchers on Cheyenne River. Over 180 families and 30% of the tribal population on the Cheyenne River Sioux Reservation were forced to leave their homes. *Id.* at 51. The reservation's largest town and two smaller ones were submerged. *Id.* at 50. BIA and tribal facilities were moved 60 miles inland. *Id.* The dams destroyed a substantial portion of the Sioux's most valuable resources. *Id.* at 41. Wild game and natural plant supplies, for example, were reduced by 75%. *Id.* at 56.

[2] When Lake Sakakawea began to fill in 1954, 85% of the members of the Mandan, Hidatsa, and Arikara Nation were forced to move. Meyer, *supra*, at 233. Of the 531 tribal homes, 436 were flooded. VanDevelder, *supra*, at 116. The Fort Berthold communities of Elbowoods, Nishu, Beaver Creek, Red Butte, Charging Eagle, Lucky Mound, Independence, and Shell Creek were wiped from the map. Maxfield, *supra*, at 29. Church cemeteries and 27 private burial grounds were relocated. Meyer, *supra*, at 289. The inundation even caused the government to relocate the graves of those Indians that served the U.S. Army over a hundred years ago – the Scouts Cemetery was moved. *Id.* The town of Elbowoods contained the reservation hospital, a boarding school, the high school, and a day school, all of which were lost and had to be replaced. *Id.* at 267. Seven other day schools were lost on Fort Berthold and every Mandan, Hidatsa, and Arikara child had to change schools. *Id.* In the early 1940's, a BIA

(Continued on following page)

At the outset of forced compensation negotiations with the United States in 1953, the Cheyenne River Sioux Tribal Chairman, Frank Ducheneaux, said: "'This is not a happy occasion. We are here to participate in the gutting of our reservation.'" Lawson, *supra* at 80. Indeed, what some tribal members refer to as "The Flood," left them "materially and spiritually impoverished." Deloria, *supra*, at xii. *See also* Meyer, *supra*, at 284, 354; Lawson, *supra*, at 58, 134, 198.

II. Subsequent efforts of the Amici Tribes to recover.

Congress has acknowledged in recent legislative enactments that the Tribes were unfairly forced to give up their most fertile and populated lands for grossly inadequate compensation and that the Tribes have not participated in the Basin's economic development, one of the major goals for constructing Missouri River dams. Pub. L. 102-575, Title XXXV, 106 Stat. 4731 (1992) (Mandan, Hidatsa, and Arikara Nation); Pub. L. 106-511, § 102(a)(2)(C), 114 Stat. 2365 (2000) (Cheyenne River Sioux Tribe).

The Tribes reside in one the most isolated regions of the Country. Due to loss of fertile bottomlands, each Tribe has suffered prolonged economic deprivation resulting in

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survey found that life on the Fort Berthold Reservation was better than that in surrounding non-Indian communities, but just 20 years later, the subsistence economy had been "shattered" and the Indians' "material and social needs, once met with agricultural abundance and tight-knit communities, had crumbled." VanDevelder, *supra*, at 93, 173. The forced relocation of the Mandan, Hidatsa, and Arikara effectively wiped out a century of progress. VanDevelder, *supra*, at 173. They went from being one of the only self-sufficient Tribes to being one almost wholly dependent on outside help. *Id.* at 183.

the Nation's highest unemployment rates. In an effort to reverse these severe economic conditions, each has invested in lake recreation to attract tourists and generate employment for tribal members. In so doing, each has relied on the plain reading of the Flood Control Act of 1944, and subsequent amendments, to require Upper Basin lake releases only when necessary to preserve a substantial navigation economy in the lower river and when such releases can be done consistent with maximizing economic and social benefits to other users. 33 U.S.C. § 701-1; Cert. Pet. at 90-112. Each has also relied on the Acts of Congress that, while taking their lands, reserved tribal access to and recreation on the reservoirs. *See, e.g.*, Pub. L. 81-437, § 11, 63 Stat. 1028, (Mandan, Hidatsa, and Arikara; inundation to takings line with no express right of access but access freely utilized with permission of the United States for over 50 years); Pub. L. 83-776, § 10, 68 Stat. 1193 (1954) (Cheyenne River Sioux Tribe).

As noted in North and South Dakota's Petition for Certiorari, the Tribes have major water intake structures to provide safe and reliable drinking water to the residents of the Reservation located on the Missouri River.[3] All of

[3] Details on the water supply crisis are provided here because, at the time of this Appeal and creation of the Administrative Record below, the water crisis and drought were not as severe and consequently, the water supply problems were not as severe. Since the creation of the Administrative Record, the Cheyenne River Sioux water intake serving 14,000 residents is currently experiencing water quality violations. It may fail as early as August 2006. Haugen, Doris, *Indian Reservation in South Dakota Faces Water Crisis*, New York Times, *May 20, 2005*. The Corps of Engineers has provided $8.45 million while the Tribe and other federal agencies have contributed over $7.5 million for a total of almost $16 million to construct a replacement intake in deeper waters. That intake will not be finished and operational until at least August 2006. The Corps of Engineers has issued a Project Information Report

(Continued on following page)

these intakes are under threat of failure, and some are experiencing ongoing water quality violations as lake levels have continued to decline with releases for navigation. These intakes serve thousands of people with no other source of safe and reliable drinking water. Cert. Pet. at fn. 4. These concerns obviously implicate not just competing economic or aesthetic interests, but rather, the fundamental health of the Missouri River's poorest residents.

The operation of the River under the Court of Appeals decision fixing forever navigation as a "dominant" trump card threatens both domestic water supply and lake recreation. Accordingly, the Tribes support the Petition of North and South Dakota to have the Court determine, 62 years after Congress enacted the Flood Control Act, Congress' long term plan for allocating the waters of the Missouri River. When Upper Basin releases can never support a substantial lower river navigation economy (as is the case in this Century), the Flood Control Act by its own words directs that the River is to be managed on the basis of the relative value of the competing uses to the overall United States economy. *Operation of the Missouri River System Litigation*, 421 F.3d 618, 629-630 (2005).

The experience of Indian people under the Flood Control Act needs to be told. That long and painful story

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documenting the severity of this problem and designating this an emergency project. Water quality violations are recorded with the United States Environmental Protection Agency and the Corps of Engineers. There are no alternative clean water sources other than the Missouri River due to contamination of tributaries by non-tribally controlled entities and lack of potable water from wells due to the lack of shallow aquifers under the Reservation.

makes clear the importance – for the Tribes – of the issue presented in the Petition. If the Court does not review the decision below, what little the Flood Control Act of 1944 left for Indian Tribes of the Upper Missouri River will be lost forever.

SUMMARY OF ARGUMENT

The Court of Appeals decision rewrote Congress' plan to provide the Tribes and others in the Upper Basin ample water supplies for Lake access, recreation and consumptive beneficial uses, so long as sufficient water supplies were released to maintain a substantial lower river navigation economy. In lieu of this Congressional compromise, the Court of Appeals, relying on erroneous dictum of this Court in *Etsi Pipeline Corporation v. Missouri*, 484 U.S. 495 (1988) directed that navigation be treated as a "dominant" interest. *Operation of the Missouri River System Litigation*, 421 F.3d at 629-30. The Tribes and their non-Indian neighbors are entitled to a full and careful construction by this Court of Congress' plan for allocating Missouri River water as set forth in the 1944 Flood Control Act, as amended – an analysis never made by the Court of Appeals.

ARGUMENT

1. The Tribes have relied upon Congress' commitment on the face of the Flood Control Act of 1944, as amended, particularly 33 U.S.C. § 701-1 and 33 U.S.C. § 701-1(b) to require Upper Basin Lake releases for down river navigation only when necessary to preserve a substantial benefit to navigation and only when such releases will not impair Upper Basin consumptive uses. Those commitments – ignored by the Court of Appeals – are essential to properly allocate Missouri River waters.

The Tribes read the plain language of the 1944 Flood Control Act, as is required, as a long-term, multipurpose authorization to develop the Missouri River Basin for the benefit of all present and future residents.[*] Indeed the Act so states:

> [I]t is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and

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[*] This reading of the 1944 Flood Control Act is confirmed by the recent enactment of the Cheyenne River Tribe Equitable Compensation Act of 2000, in which Congress declared that, "by enacting the Act of December 22, 1944, commonly known as the "Flood Control Act of 1944", Congress approved the Pick-Sloan Missouri River Basin Program – (A) to promote the general economic development of the United States. . . . " Pub. L. 106-511, § 102(a)(1)(A), 114 Stat. 2365 (2000).

> coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

33 U.S.C. § 701-1; *see also*, N.D. Cert. Pet. at App. 90.

Congress in the Flood Control Act focused on how federal dams were to interact with then existing uses of the Missouri River. Established and potential uses were to be protected "to the fullest possible extent" and separately the dams could be used to benefit navigation, if that navigation were to provide substantial economic benefits. 33 U.S.C. § 701-1. Congress subsequently directed that navigation releases cannot impair "upstream beneficial consumptive uses" in States wholly or partially West of the 98th Meridian – which includes North and South Dakota and the territories of the Tribes. 33 U.S.C. § 701-1(b).7

These statutory directives – including the limitation on Missouri River water for navigation releases – were ignored when the Eighth Circuit ruling set in place a water allocation regime favoring the small navigation interest still functioning in the lower 20% of the River regardless of the "relative economic value" of competing uses and ignored the requirement that such navigation be substantial, by categorically designating navigation as a "dominant" purpose. 421 F.3d at 629.

Congress did not limit its directives to protecting then existing uses and limiting dam releases to only that amount necessary to sustain what might in 1944 become substantial navigation. To the contrary, in order to put all